

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The resolution of this appeal turns upon a single question of law: whether this court has jurisdiction over claimant's workers compensation claim. If there is Kansas jurisdiction, the ALJ had complete authority to issue his Order and it must therefore be affirmed. Conversely, if there is no basis for Kansas jurisdiction, then his Order must be set aside.

The circumstances surrounding claimant's hiring in 2003 are somewhat detailed, but based upon the parties' briefs, are well known to both of the litigants and will not be unnecessarily repeated herein. Distilled to their essence, respondent was in the process of acquiring APAC, another concrete company that claimant was working for as a hauler/driver. When it became clear claimant's then-employer was going to be acquired, there was a process by which respondent's plant managers, Craig Donnelly and Charlie Welch would interview APAC's employees and decide which of them would be hired.

There was some sort of misunderstanding and claimant's employment with APAC was terminated, albeit prematurely. Nonetheless, claimant continued to seek employment with respondent, the company that was acquiring APAC. According to claimant, he went through the interview process with Jay Reccuglia, the individual who was overseeing the acquisition of APAC and the hiring process. Mr. Reccuglia's office was located in Kansas. Claimant maintains he delivered all of his paperwork to the Kansas office, along with a completed drug screen report and with that submission, was assigned to work in the Lee's Summit, Missouri location of the company. Indeed, the application paperwork provided at the preliminary hearing bears Mr. Reccuglia's signature. Janice Smith, an employee of respondent's, concedes that once the employment application, interview, successful DOT exam and drug test are completed and received, again in the Kansas office, the hiring process is complete.<sup>1</sup>

Mr. Reccuglia testified that he doesn't specifically recall claimant's hiring. But, he testified that the process involved in hiring the former APAC employees (such as claimant) did not include the Kansas office. He contends that any interviews would have been done either in the Lee's Summit or the Sugar Creek plants, both in Missouri. The drug screen would have occurred in Missouri and any ultimate job offers would have been extended from one of the two plants, both in Missouri. Mr. Reccuglia stated he would have overseen this process from his office in Kansas, but would not have been directly involved. Thus, it is his contention that the claimant's contract for hire could not and did not occur in Kansas.

Two other witnesses testified on respondent's behalf. But both Mary Kathryn Richardson and Janice Smith had no personal knowledge of the claimant's hiring. They merely testified generally about the hiring process within respondent's company. They confirm that claimant was hired for the Lee's Summit plant and that the drug tests for prospective employees were purportedly scheduled by Ms. Smith, and took place in

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<sup>1</sup> P.H. Trans. at 54.

Missouri and the results were ultimately faxed to the Kansas office. Ms. Smith testified that the last step in the hiring process is to refer the prospective employee out for a drug screen. Once that paperwork is received back in the Kansas office, that act is the last element in the hiring process.<sup>2</sup>

The ALJ considered this evidence and concluded that there was Kansas jurisdiction. In doing so, he must have been persuaded by claimant's testimony over that offered by respondent's witnesses. After considering the entirety of the record, this member of the Board agrees with the ALJ's finding and holds that the ALJ's preliminary hearing Order should be affirmed.

While it is true that Mr. Reccuglia's version of the claimant's hiring is entirely different from claimant's, this Board Member believes that claimant's version is credible and understandable. Claimant's hiring was anything but routine given the fact that he was prematurely terminated from his previous employment during respondent's acquisition of APAC. He was not supposed to be terminated and instead was supposed to proceed through the interview process with either Craig Donnelly or Charlie Welch. Once he was fired, he went ahead and followed through with the application process. But according to claimant, that required him to deliver his application paperwork, including his driving record, to respondent's offices in Kansas. He maintains he talked with Mr. Reccuglia and believed it was Mr. Reccuglia who hired him. Claimant completed the drug screen and upon delivery of those results to the Kansas office, via fax, the employment process was complete.

Mr. Reccuglia testified that he did not recall anything specifically about claimant's hiring. The bulk of his testimony was general information, setting forth what the process *normally* would be. It does not appear that the hiring process went normally for claimant. The company was in the midst of an acquisition and employees for the company being acquired were summarily being terminated, thus derailing the interviewing and hiring process. This Board Member believes claimant's version of the events is more credible than the general testimony offered by Mr. Reccuglia.

Respondent has also attempted to impune claimant's credibility by producing a DVD which depicts claimant's activities when he was moving his personal belongings in February 2009. Respondent believes claimant's activities on this DVD are wholly inconsistent with his testimony that he is unable to do certain movements, continues to have problems with his shoulder and that he merely watched while others moved his family's belongings. While the DVD depicts claimant's activities on a day that was likely to have been physically challenging and may well erode his claim for further medical treatment, this Board Member finds that his testimony is not so inconsistent so as to

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<sup>2</sup> *Id.* at 57.

destroy claimant's credibility on the issue of his hiring. The ALJ's preliminary hearing Order is, therefore, affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>3</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 26, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2009.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

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<sup>3</sup> K.S.A. 44-534a.